National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 16, 1998

TO: Victoria E. Aguayo, Regional Director, Region 21

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Desert Horizons Country Club, Case 21-CA-32537

530-4080-0175-8033, 530-4080-5012-6700

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by withdrawing recognition from the Union based upon a petition from a majority of the bargaining unit employees stating that they "decline to be represented by the contract of" the Union.

FACTS

The Employer voluntarily recognized Teamsters Local 166 (the Union) at an unknown time in 1996 after acquiring the operation from a previous Employer who had also recognized the Union. The most recent collective-bargaining agreement between the Employer and the Union was effective by its terms from November 21, 1996 through March 31, 1998. In January 1998, the Employer received a petition signed by eleven of the twenty-one bargaining unit employees stating that they "decline to be represented by the contract of [the Union] henceforth January 16, 1998." After verifying the signatures on the petition, the Employer notified the Union by letter dated January 27, 1998, that it had "an objective, good faith doubt" that the Union no longer represented a majority of the unit employees, and that it was withdrawing recognition from the Union at the expiration of the contract. The Employer is not alleged to have violated the Act in any other way. The Region's investigation failed to disclose that the petition was unlawfully tainted.

The unit employee who drafted and circulated the petition states that he came up with the language on the petition, and that his intention was to get rid of the Union altogether. He also states that he told Spanish-speaking unit employees that the purpose of the petition was to get rid of the Union; his statement is verified by the three petition signers interviewed by the Region.

ACTION

We agree with the Region that the charge should be dismissed, absent withdrawal.

In Celanese Corp. of America, 95 NLRB 664 (1951), the Board held that upon the expiration of the certification year or a contract, an employer may withdraw recognition from a union if either the union has in fact lost majority support or the employer has a good-faith doubt of the union's majority support or the employer has a good-faith doubt of the union's majority status supported by objective considerations.[(1)] However, on April 13, 1998, the Board invited the parties in two pending cases[(2)] to file supplemental briefs on a number of issues including whether the Board should overrule Celanese Corp. The General Counsel's supplemental brief in those cases argued that an employer should not be able to withdraw recognition based on the good faith doubt standard set forth in Celanese, but should instead be required to file an election petition in order to test the Union's majority status.

In the instant case, it is clear that a majority of unit employees no longer wish to be represented by the Union, as reflected by eleven out of twenty-one unit employees signing the untainted anti-Union petition. Although the petition states that the signatory unit employees "decline to be represented by the contract of [the Union] henceforth January 16, 1998" the evidence shows that employees were clearly told the purpose of the petition was to get rid of the Union. Further, we also note that the contract had been in effect for over a year and was coming to an end when the petition was drafted and signed, supporting the

employees' stated desire to get rid of the Union altogether and not just the contract. Thus, the Employer certainly had a "reasonable" doubt that "the Union retained the support of a majority of employees."[(3)]

Notwithstanding the General Counsel position in Chelesa and Levitz described above, it does not appear appropriate in this case to issue complaint where the sole theory of violation is based on the General Counsel's position in Chelesa that Celanese should be overruled. In this regard, it is clear that the Union no longer represents a majority of employees. Thus, under the law as it now stands, this case should be disposed of in accord with extant Board law to dismiss charges alleging that an employer unlawfully withdrew recognition after the certification year or after expiration of a contract in circumstances where the union has in fact lost majority status among unit employees without any unlawful interference by the employer.[(4)]

In these circumstances, where we possess independent evidence that an untainted majority of the employees no longer support the Union, it would not effectuate the policies of the Act to allege that the Employer violated Section 8(a)(5) by refusing to bargain with the Union.

Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.

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[1] This principle was noted by the Board in Auciello Iron Works, 317 NLRB 364, 367 (1995), on remand from 980 F.2d 804 (1st Cir. 1992). Thus, the Board in holding that the employer violated Section 8(a)(5) by withdrawing recognition and refusing to execute a contract based on its "good faith" doubt that the employer asserted after the union had accepted its offer, specifically noted that the case before it did not involve allegations of an actual loss of majority status. Further, the Board stressed that its decision does not affect the "principle that a union and an employer are not permitted to continue bargaining if the union has actually lost it majority status and the employer and the union are aware of this actual loss." 317 NLRB at 375.

[2] Chelsea Industries, Inc., Case 7-CA-36846 et al. and Levitz Furniture Company, Case 20-CA-26596.

[3] See Ambac International, 299 NLRB 505, 506-07 (1990)(Board reversed ALJ's finding that the employer, in withdrawing recognition, could not rely on employee letters stating that their "interests might best be served through individual, direct negotiation with AMBAC International, not through a third party, presently" the union), and cases cited therein.

[4] See, e.g., Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994; J.P. Data Com, Cases 21-CA-26562 and 26579, Advice Memorandum dated April 3, 1989.